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Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
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No. 75-553

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, AFL-CIO, *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., Debtor,
RAILWAY EXPRESS AGENCY, INC., Debtor-In-Possession,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October, 1975

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No.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, AFL-CIO, *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., Debtor,
RAILWAY EXPRESS AGENCY, INC., Debtor-In-Possession,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Brotherhood of Railway, Steamship and Airline Clerks, Freight Handlers, Express and Station Employes, AFL-CIO (BRAC), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 27, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix "A" hereto. The opinion and order of the United States District Court for the Southern District of New York, on appeal from an order of a Bankruptcy Judge of that Court, issued May 19, 1975, not yet reported, appears in Appendix "B" hereto. The opinion and order of Bankruptcy Judge John J. Galgay of the District Court, issued May 2, 1975, also not yet reported, appears in Appendix "C" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 27, 1975. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Secton 1254(1).

QUESTION PRESENTED

Where the Railway Labor Act expressly applies to any receiver, trustee, or other individual or body, judicial or otherwise, when in possession of the business of a carrier subject thereto and where such Act specifically prohibits the changing or termination of a collective bargaining agreement except in accordance with prescribed procedures, does Section 313(1) of the Bankruptcy Act permit a District Court to authorize a debtor-in-possession of the business of a carrier subject to the provisions of the Railway Labor Act to reject a collective bargaining agreement in disregard of the requirements of the Railway Labor Act?

STATUTORY PROVISIONS INVOLVED

This case primarily involves provisions of the Railway Labor Act (45 U.S.C., Sections 151, et seq.) and of Chapter XI of the Bankruptcy Act (11 U.S.C., Sections 701, et seq.) as follows:

Section 2, First, of the Railway Labor Act (45 U.S.C., Section 152, First) reads as follows:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Seventh, of the Railway Labor Act (45 U.S.C., Section 152, Seventh) reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 1, First, of the Railway Labor Act (45 U.S.C., Section 151, First), reads in pertinent part as follows:

> "The term 'carrier' includes any express company, * * * subject to the Interstate Commerce Act, * * * and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier' * * * ."

Section 313(1) of Chapter XI of the Bankruptcy Act (11 U.S.C., Section 713(1)) reads in pertinent part as follows:

> "Upon the filing of a petition, the court may * * * —
>
> "(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;".

STATEMENT OF THE CASE

Petitioner BRAC is a labor organization primarily representing employees in the craft or class of office, clerical, station, and stores positions of carriers (railroads, airlines, and express companies) subject to the Railway Labor Act (45 U.S.C., Sections 151, et seq.). The respondent REA Express, Inc., Debtor, is a carrier subject to the provisions of the Railway Labor Act engaged in both surface and air transportation of property. *REA Express, Inc.* v. *Brotherhood of Railway and Airline Clerks,* 459 F.2d 226 (5th Cir., 1972), *cert. den.* 409 U.S. 892.

BRAC has represented most of the employees of the respondent and its predecessor companies since March 1, 1922. This representation originally included all of the employees of respondent except drivers in certain cities and mechanic employees engaged in the maintenance and servicing of vehicles. When the original Railway Labor Act was enacted on May 20, 1926 (44 Stat. 577), the representation of employees of respondent was made subject to the provisions of that statute. On December 10, 1965, the National Mediation Board certified BRAC to represent all of the employees of the respondent with the exception of the mechanic

employees represented by the International Association of Machinists.[1] In May 1975, such representation involved approximately 6,300 employees of the respondent holding bulletined jobs with respondent. *REA Express* v. *Brotherhood of Railway and Airline Clerks,* 358 F.Supp. 760 (D.C. S.D. N.Y., 1973).[2]

Since 1922, BRAC and REA Express (or its predecessor companies) have been parties to a basic collective bargaining agreement, revised from time to time, governing the employment of the bulk of the carrier's employees. This agreement has, among other things, in addition to providing for compensation and hours of work, established seniority rights for such employees controlling their assignment, promotion and work location; provided supplemental unemployment compensation; provided benefits in case of consolidations and transfers; provided grievance procedures to correct against illegal or arbitrary management actions. These procedures for the resolution of employee grievances are required by Section 3 of the Railway Labor Act (45 U.S.C., Section 153), which this Court has described establishes a system of "compulsory arbitration". *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.,* 353 U.S. 30 at page 39.

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[1] The history of the BRAC representation of employees of respondent is set forth by the National Mediation Board in Volume 4, pages 253, et seq., of the Board's "Determinations of Craft or Class of the National Mediation Board", involving the Board's decision "*In the Matter of Representation of Clerical, Office, Station and Storehouse Employes, Employees of REA Express, Inc.*".

[2] Appendix "C", page 20a. Paragraph 13(b) of the affidavit of Mr. Tom Kole, President of respondent, submitted to the Bankruptcy Court in support of respondent's bankruptcy petition, states that the carrier employs in excess of 12,000 persons not counting almost 10,000 employees who are currently on furlough.

The agreement also contained a non-discrimination clause to protect minority groups and female employees. *International Brotherhood of Teamsters* v. *Brotherhood of Railway and Airline Clerks,* 358 F.2d 540 (D.C. Cir., 1966); *REA Express* v. *Brotherhood of Railway and Airline Clerks,* 358 F.Supp. 760 (D.C. S.D. N.Y., 1973).[3] The Bankruptcy Court found that the employee rights set forth therein were of substantial value, the loss of which could not be compensated for by money. The BRAC agreement and all of its revisions since 1922 were executed pursuant to the provisions of the Railway Labor Act, Section 2, First, of which, quoted above, page 3, requires BRAC and respondent to exert every reasonable effort to make and maintain agreements covering rates of pay, rules, and working conditions of employees in order to avoid interruptions to interstate commerce. Such requirement is designed to create an enforceable legal obligation. *Chicago & N. W. Ry. Co.* v. *United Transportation Union,* 402 U.S. 570 (1971).

Section 2, Seventh, of the Railway Labor Act (45 U.S.C., Section 152, Seventh), quoted above, page 3, also specifically controls the revision and termination of collective bargaining agreements subject thereto by prohibiting a carrier from undertaking such action not in the prescribed manner. Article XIII of the last revision of the BRAC-REA agreement dated May 3, 1973, provided that it should remain in effect until December 31, 1975, and thereafter until changed or modified in accordance with the provisions of the Railway Labor

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[3] The basic collective bargaining agreement between BRAC and REA in effect on February 18, 1975, was last revised on May 3, 1973, and appears as REA Exhibit No. 8-B in the proceedings before Bankruptcy Judge Galgay.

Act. Section 6 of the statute (45 U.S.C., Section 156) provides for written notice of an intended change in agreements, conferences between the parties with respect thereto, and mediation by the National Mediation Board where necessary.[4] Neither a carrier nor employees may invoke self-help to revise or terminate the provisions of a collective bargaining agreement until they have exhausted these mandatory provisions of the statute. *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963).

Congress made these compulsory requirements applicable to railroads, express companies, sleeping car companies, and in 1936 extended such requirements to airlines. They now cover agreements of surface carriers and 903 airline agreements.[5] Congress has also specifically made these statutory requirements applicable to any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of a Railway Labor Act carrier.

On February 18, 1975, the respondent and its affiliated companies filed petitions with the District Court, pursuant to the provisions of Chapter XI, Section 322, of the Bankruptcy Act (11 U.S.C., Sections 722, et seq.). The petition of respondent is identified as *"In the Matter of REA Express, Inc., f/k/a Railway Express Agency, Inc., Debtor—In Proceedings for an Arrangement*—No. 75-B-253". This petition prayed

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[4] Section 10 (45 U.S.C., Section 160) provides for the appointment of Presidential Emergency Boards to hear and report on the contract disputes which threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service.

[5] 40th Annual Report of National Mediation Board, Table 8, page 77.

that proceedings be had upon the petition in accordance with the provisions of Chapter XI. On the same date, on motion of the attorneys for respondent, the Bankruptcy Court entered an order providing that the Debtor be authorized to operate its business and manage its property pursuant to Section 343 of the Bankruptcy Act (11 U.S.C., Section 743) and Rule 11-23 of the Rules of Bankruptcy Procedure until further order of the Court (Appendix "C", page 20a).

On March 24, 1975, the Debtor REA filed a motion with the Bankruptcy Court, pursuant to Section 313(1) of the Bankruptcy Act (11 U.S.C., Section 713(1)), for an order permitting the rejection of the collective bargaining agreements with BRAC as well as with the International Association of Machinists and Aerospace Workers. Those agreements were the only contracts which REA Express sought to reject. Indeed, the record shows that it made weekly payments of substantial amounts to the airlines under its air express contract. REA thus attempted to impose upon the employees all of the burdens flowing out of its bankruptcy. This is completely consistent with the carrier's view asserted in prior judicial proceedings involving the revision of the BRAC contract that the stockholders would put no more capital into the enterprise and that it was up to the employees to supply the needed capital. *REA Express* v. *Brotherhood of Railway and Airline Clerks,* 358 F.Supp. 760 at pages 764-765 (D.C. S.D. N.Y., 1973).

The unions opposed the motion on the grounds, among others, that the Railway Labor Act prohibited the rejection of the REA collective bargaining agreements. After hearing, the Bankruptcy Judge denied REA's motion on the grounds that "this

is not the kind of rejection or disaffirmance intended by Congress nor would it be within the over-all scheme of Chapter XI" (Appendix "C", page 29a). The Bankruptcy Judge found that the disaffirmance of the agreements would place the employees at a substantial disadvantage and would destroy valuable contract rights which could not be compensated for in a claim against the respondent, although such claims were the normal procedure in the case of rejected contracts. The Court concluded that the balance of the equities favored the employees. REA appealed this decision to the District Court, which reversed the Bankruptcy Judge and granted the REA motion. In so doing, the District Court found that the collective bargaining agreements were subject to rejection under Section 313(1) of the Bankruptcy Act. The District Court also concluded that the provisions of the Railway Labor Act did not preclude rejection because they applied only during the life of the agreement and ceased to have any application if the agreement had come to an end either by expiration of the term thereof or by rejection in bankruptcy (Appendix "B" hereto).

The District Court took the position that the collective bargaining agreement stood disaffirmed from the moment of its order. BRAC therefore sought a stay of such order from the Court of Appeals pending resolution of the timely filed appeal from the District Court's order. Such a stay was denied on May 27, 1975. On August 27, 1975, the Court of Appeals issued its opinion affirming the District Court order. It did so on the grounds (1) that collective bargaining agreements are executory contracts within the meaning of Section 313(1) of Chapter XI of the Bankruptcy Act, and (2) that the provisions of the Railway Labor Act

for the termination or revision of the collective bargaining agreements were not applicable because the Debtor was a different entity from the pre-bankrupt company and is therefore not a "party" to the agreement. The opinion of the Court of Appeals relied on its decision of July 24, 1975, in *Shopmen's Local Union No. 455, et al., and NLRB* v. *Kevin Steel Products, Inc.* (Dockets Nos. 74-1872 and 74-2154), in which it reversed a decision of the District Court holding that Section 313(1) of Chapter XI of the Bankruptcy Act did not authorize a rejection of a collective bargaining agreement executed pursuant to the provisions of the National Labor Relations Act.[6]

The Court of Appeals decision also remanded the case to the District Court for further consideration and findings on the question of whether the BRAC collective bargaining agreements are onerous and burdensome to warrant an authorization to the Debtor-in-possession to reject them.

Since May 27, 1975, the respondent has operated on the premise that its employees have no contract rights and that it can do what it pleases with respect to rates of pay, rules, and working conditions. This situation has resulted in a substantial amount of employee unrest which on June 16, 1975, erupted into wildcat strikes resulting in an action by REA Express against BRAC and numerous individuals for injunctive and monetary relief. *REA Express* v. *BRAC, et al.* (75 Civ. 2879, S.D. N.Y.).[7]

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[6] BRAC was informed that the NLRB is considering filing a petition for certiorari to review the *Kevin Steel Products* case.

[7] The carrier subsequently withdrew its damage claims against BRAC.

REASONS FOR GRANTING THE WRIT

1. This Case Presents an Important Question Concerning the Application of the Bankruptcy Laws to Collective Bargaining Agreements Which Should Be Decided by This Court

The decision below enables the Debtor-in-Possession to unilaterally destroy a collective bargaining agreement which, as revised from time to time in accordance with the provisions of the Railway Labor Act, has been in effect for more than 50 years, and to jeopardize the rights of the employees provided for therein. The Bankruptcy Court found that the pension rights, welfare rights, seniority rights, and other rights of the employees under the collective bargaining agreement could not be valued for damage claims or other claims against the Debtor as is normal in the rejection of an executory contract in a bankruptcy proceeding. Moreover, although the Court of Appeals found that the Debtor was required under the provisions of the Railway Labor Act to negotiate a new agreement, the Bankruptcy Court found that any such requirement is worthless because the rejection of the existing collective bargaining agreement would destroy the economic balance of power between the parties so that the "employees would be at a substantial disadvantage and be in the position where REA could dictate the terms of any new agreement". The application of the bankruptcy statute to Railway Labor Act collective bargaining agreements is a question which should be determined by this Court because of the clear adverse impact of the decision below upon the national labor policy established by the Congress of maintaining such agreements for the purpose of avoiding interruptions to interstate commerce or to the operations of carriers engaged therein.

This purpose is set forth in Section 1a of the Railway Labor Act (45 U.S.C., Section 151a), which enumerates the statutory proposition, and again in Section 2, First, quoted above, page 3, which imposes a duty upon employees and carriers to make and maintain collective bargaining agreements for such purpose. Such purpose was recognized and enunciated by this Court in its decision in *State of California* v. *Taylor,* 353 U.S. 553 at pages 565 and 566. In that case, this Court declared that the Railway Labor Act, like the Safety Appliance Act, is "all-embracing in scope and national in its purpose". The provisions of Section 1, First, of the Railway Labor Act, quoted above, page 3, which impose all of the duties and requirements of the statute upon receivers, trustees, or "other individual or body, *judicial* or otherwise" (emphasis supplied), when in the possession of the business of a Railway Labor Act carrier, is in furtherance of this congressional policy. Such provisions were not adopted merely for the purpose of employers, employees, or stockholders,[8] whether Debtors-in-Possession in bankruptcy or not, but in furtherance of the specific congressional purposes of aiding in the avoiding of interruptions to interstate commerce through stability of labor relations on the property of carriers. That purpose is defeated by the decision below. In the case of the particular Debtor, the decision below has already contributed immeasurably to hostility between labor and management and given substantial impetus to labor unrest. Such an impact upon poli-

[8] REA Express, the Debtor here involved, is not a publicly owned corporation but is owned and controlled by a handful of stockholders. *REA Express* v. *Brotherhood of Railway and Airline Clerks,* 358 F. Supp. 760 at page 774, footnote 52 (D.C. S.D. N.Y., 1973).

cies established by Congress warrants the consideration of the legal issues involved by this Court.

In addition, the decision below destroys the mandatory provisions of Section 3 of the Railway Labor Act for the purpose of resolving employee grievances which this Court has described as a unique system of "compulsory arbitration". *Brotherhoood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, 353 U.S. 30. It has long been recognized that the prompt and equitable resolution of employee grievances is one of the foundations of industrial peace. It is inconceivable that any carrier, including a Debtor-in-Possession under Chapter XI of the Bankruptcy Act, is free to reject these compulsory statutory requirements. If such a result is to be brought about by judicial action, then it should be decided by the highest Court in the land so that the public policy problems involved can then be considered by the Congress.

The conflict between the decision below and the national labor policy established by Congress in the Railway Labor Act is further emphasized by the provisions of Section 77(n) of the Bankruptcy Act which specifically prohibit Federal District Courts from changing or terminating the provisions of collective bargaining agreements of railroads in reorganization under Section 77. The presence of this prohibition in Section 77(n) constitutes a clear declaration by Congress that the basic purposes of the Railway Labor Act of achieving industrial peace through the making and maintaining of collective bargaining agreements is more important to the public interest than the interest of a carrier in bankruptcy or its stockholders or other creditors. Nor would it make any sense to con-

tend that Congress did not intend its prohibition to apply to bankruptcy proceedings other than those under Section 77 because of the absence of such language from the other bankruptcy sections. The legislative history of the Railway Labor Act shows that the language involved was placed in the Bankruptcy Act and the Emergency Railroad Transportation Act of 1933 at a time when Section 2, Seventh, was not a part of the Railway Labor Act, and that such language is almost identical to the subsequent provisions of Section 2, Seventh. When Section 2, Seventh, is read in conjunction with the provisions of Section 2, First, it clearly precludes a Debtor-in-Possession or a judge or trustee from changing terms and working conditions of employees except as provided in Section 2, Seventh. Thus, the prohibitions of the Railway Labor Act after its 1934 amendments are as specific as are the prohibitions contained in Section 77(n). The decision below was forced to recognize this fact and to arrive at its final conclusions through a so-called process of accommodation of the Railway Labor Act and the Chapter XI Bankruptcy Act. However, in making this accommodation, the decision below ignores the basic purposes of the Railway Labor Act and places all the emphasis on the bankrupty statute. If this had been the intent of Congress, Section 2, First, would not appear in the Railway Labor Act along with Section 2, Seventh.

2. The Decision Below Conflicts With Other Decisions Applying the Railway Labor Act

In *Order of Railway Conductors* v. *Pitney,* 326 U.S. 561, this Court cited the provisions of the Railway Labor Act here involved and held that the District Court's jurisdiction to act with respect to Railway Labor Act "minor" disputes thereunder was limited

by such provisions to the same role as that of the bankrupt carrier involved. Although this decision was briefed and cited to both the District Court and the Court of Appeals, it was not mentioned in the decisions below. The decision below also conflicts with the decision of this Court in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579. In that case, this Court recognized that collective bargaining agreements are not ordinary contracts but a code of rules which call into being a new common law. The Bankruptcy Court recognized that collective bargaining agreements were different from the ordinary contracts and concluded that rejection of collective bargaining agreements was not intended by Congress in adopting the provisions of Section 313(1) and was not within the over-all scheme of Chapter XI. The decision below treats a collective bargaining agreement as any other type of contract. Indeed, the present decision is in conflict with an earlier decision of the same Court of Appeals in *Burke* v. *Morphy,* 109 F.2d 572, *cert. den.* 310 U.S. 635. In that case, the Court held invalid under the cited provisions of the Railway Labor Act the action of a District Court in directing a receiver of a bankrupt railroad to withhold 15% of its employees' wages. In so doing, the Court (page 575, footnote 1) stated that the Railway Labor Act in its express inclusion of receivers in the definition of a "carrier" represented a definite turning away from the earlier and much criticized attempts of receivership judges to force operations of financially distressed railroads through the use of contempt proceedings against employees. In its present decision, the Court of Appeals seeks to distinguish its earlier contrary decision by stating that it construes the earlier decision as dealing with a situation in which the receiver had "im-

plicity" adopted the Debtor's labor agreement. However, there is nothing in that decision to so indicate and, in fact, the decision rested on the cited provisions of the Railway Labor Act and not upon any implicit adoption of the agreement. In the present case REA defended its unilateral action in cutting the employees' wages before the Bankruptcy Judge not on the grounds that it had rejected the agreement but on the grounds that the employee claims simply gave rise to grievances to be processed under Section 3 of the Railway Labor Act and the Bankruptcy Judge accepted this contention (Appendix "C" hereto, page 29a). This inconsistency in the approach of the Court of Appeals creates another reason why the important issues involved should be reviewed by this Court.

Moreover, the recent decision of the Ninth Circuit in *Acheson, et al.* v. *Falstaff Brewing Corp.*, Case No. 73-2855, decided August 25, 1975, is contrary to the holding of the Court below in the present case that the collective bargaining agreement is terminated by the petition in bankruptcy because the Debtor-in-Possession is a new juridical entity. In that case, there was involved the issue of whether a new employer was bound to recognize rights of employees of a bankrupt company whose plant had been purchased by the new employer. The Ninth Circuit held that in the case before it the new employer was not so required but only because there was not a high degree of enterprise continuity which would justify imposing obligations on the new employer. In this connection, the Ninth Circuit cited the decisions in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). In the present case, there is complete enterprise continuity. The

same business enterprise is being operated by the same management. It is implicit in the Ninth Circuit decision that if Falstaff had continued the operations of the bankrupt employer, that successor company would have been subject to the requirements of the decisions in the *Burns* and *John Wiley & Sons* cases.

3. The Decision Below Erroneously Impairs a Clear Congressional National Labor Policy

The Court of Appeals found that the Debtor REA was a "new juridical entity" and was thus not a party to and was not bound by the terms of a collective bargaining agreement which it had entered into. It was thus free to accept or reject the collective bargaining agreement. The Court compared the situation to that of a successor employer subject to the National Labor Relations Act. There is, of course, no comparison between a successor employer where the business has been transferred through purchase and the same company simply operating under a bankruptcy order protecting it from suits by creditors pending efforts to reorganize the business. It is simply the same people doing business at the same old stand. *Acheson, et al.* v. *Falstaff Brewing Corp.* decision above, page 16.

Nor does this theory solve the conflict with the specific provisions of the Railway Labor Act created by the application of 313(1) of Chapter XI of the Bankruptcy Act to collective bargaining agreements. The Debtor cannot unilaterally reject the contract. He must apply to the Bankruptcy Court for permission to do so and the prohibitions of the statute clearly apply to that Court. When the language of Sections 2, First, and 2, Seventh, is put together, the statute clearly reads that no Court or trustee can change collective bargaining agreements except as provided for in Sec-

tion 2, Seventh. Also, the Debtor is clearly a "carrier" within the requirements of the Railway Labor Act and as such is bound to "maintain agreements" and change them only in accordance with the provisions of the statute. In fact, the Court of Appeals in its decision holds that a trustee or Debtor-in-Possession being a carrier is expressly obligated by Section 2, First, of the Railway Labor Act to "exert every reasonable effort to make and *maintain agreements* concerning rates of pay, rules, and working conditions * * *." (Emphasis added.) The Court interprets this as imposing an obligation on the Debtor only to make an agreement and not maintain an existing agreement, but this interpretation is clearly contrary to the statutory language. Moreover, requiring a Debtor to negotiate a new agreement within a framework where such Debtor has already rejected the old agreement does not meet the statutory requirements. As the Bankruptcy Court found, the rejection of existing collective bargaining agreements destroys the economic balance of power between the parties when the contracts were entered into so that the employees would be at a substantial disadvantage and be in the position where REA could dictate the terms of any new agreement (Appendix "C" hereto, page 27a).

The Court of Appeals recognizes what it characterizes as the apparent conflict in the language and purpose of the Railway Labor Act and the Bankruptcy Act and sets out to engage in a judicial accommodation of the two statutes. The accommodation is to conclude that Congress intended that Section 313(1) of the Bankruptcy Act should be applicable to collective bargaining agreements since otherwise the end result could well be to preclude financial reorganization of a car-

rier and thus lead to its demise, and that the unions and employees had shown no reasons why they should, under the circumstances, be permitted to insist upon strict compliance with their agreements. At the same time, the Court is forced by the decisions of this Court to agree that the Debtor is otherwise bound by the Railway Labor Act and must negotiate a new agreement. The conclusion that the Court's interpretation of Section 313(1) is necessary to prevent the demise of a bankrupt carrier is inconsistent with the clear necessity for holding the Debtor subject to the other provisions of the Railway Labor Act, including Section 2, First, because if an impasse is reached in such negotiations the unions are free to strike.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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October, 1975

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1220, 1221—September Term, 1974.

(Argued June 27, 1975 Decided August 27, 1975.)

Docket Nos. 75-5007, 75-5008

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, AFL-CIO,

Appellant,

against

REA EXPRESS, INC., Debtor,
REA EXPRESS, INC., Debtor-in-Possession,

Appellee.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Appellant,

against

REA EXPRESS, INC., Debtor,
REA EXPRESS, INC., Debtor-in-Possession,

Appellee.

Before:

CLARK, *Associate Justice,**
MANSFIELD and MULLIGAN, *Circuit Judges.*

Appeal by the Brotherhood of Railway, Airline and Steamship Clerks and the International Association of Machinists and Aerospace Workers from a decision of the United States District Court for the Southern District of

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* Supreme Court of the United States, retired, sitting by designation.

New York, Inzer B. Wyatt, *Judge,* permitting REA, as debtor-in-possession of REA Express, Inc., to disaffirm executory collective bargaining agreements with the two unions under § 313(1) of the Bankruptcy Act, 11 U.S.C. § 713(1).

Remanded.

SHELDON ENGELHARD, Esq., New York, N.Y. (Robert L. Jauvtis, Esq., Vladeck, Elias, Vladeck & Lewis, P.C., New York, N.Y., of Counsel), *for Appellant International Association of Machinists and Aerospace Workers, AFL-CIO.*

DAVID J. FLEMING, Esq., New York, N.Y. (Reilly, Fleming & Reilly, New York, N.Y., James L. Highsaw, Esq., Highsaw & Mahoney, Washington, D.C., William J. Donlon, Esq., Rosemont, Illinois, of counsel), *for Appellant Brotherhood of Railway and Airline Clerks.*

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MANSFIELD, *Circuit Judge:*

Once again we are called upon, within a matter of weeks, to determine whether a trustee or debtor-in-possession in bankruptcy under the Bankruptcy Act may, under § 313(1) of that Act, 11 U.S.C. § 713(1), disaffirm executory collective bargaining agreements entered into by the debtor. In *Shopmen's Local Union No. 455, et al., and NLRB* v. *Kevin Steel Products, Inc.,* —— F.2d ——, Dkt., Nos. 74-1872, 74-2154 (2d Cir., July 24, 1975), we held that § 313(1) permits the bankruptcy court to authorize a trustee or

debtor-in-possession to reject a collective bargaining agreement governed by the National Labor Relations Act upon a showing that it is onerous and burdensome and that the equities tip decidedly in favor of termination. In the present case we similarly hold that executory collective bargaining agreements subject to the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, may be rejected but remand the case for further determination as to whether the agreements in issue are sufficiently onerous and burdensome to warrant grant of such authority pursuant to § 313(1).

REA Express, Inc. ["REA" herein], a corporation engaged in the surface and air transport of express shipments, is a party to separate collective bargaining agreements with two unions (the "unions" herein), the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC" herein) and the International Association of Machinists and Aerospace Workers ("IAM" herein). These agreements govern the wages and working conditions of approximately 6,600 persons of some 7,600 currently employed by REA. The agreements expire on December 31, 1975, and June 1, 1976, respectively. In addition to matters usually covered in a collective bargaining agreement, the agreements substantially affect REA's right to close or consolidate facilities and transfer or lay off workers. In particular, both agreements require payment of supplementary unemployment benefits to workers who are laid off and the BRAC agreement provides that workers who elect to follow their work in a consolidation are entitled to free transportation and other allowances for the dislocation. Under the BRAC agreement, transfers and consolidations can be effected by REA only upon notice to the union and with substantial delays. BRAC, furthermore, may demand arbitration of a dispute over the effects of a consolidation.

On February 18, 1975, REA and several affiliated companies filed petitions under Chapter XI, § 322 of the Bank-

ruptcy Act, 11 U.S.C. § 205 *et seq.*, and by court order REA was continued as debtor-in-possession of its property. On March 24 REA moved pursuant to § 313(1) of the Bankruptcy Act, 11 U.S.C. § 713(1),[1] and Rule 11-53 of the Rules of Bankruptcy Procedure, for an order permitting rejection of the BRAC and IAM agreements as onerous and burdensome. In support of this motion, REA presented evidence, accepted by the Bankruptcy Judge, that it had incurred substantial liabilities as debtor-in-possession, had an outstanding payroll liability of over four million dollars, and was unable to meet its expenses on a current basis REA claimed that it could not continue to operate without significantly reducing costs, and had developed a plan for drastic curtailment and consolidation of its operations. In sum, the collective bargaining agreements are claimed to be onerous and burdensome because (1) their supplemental unemployment and consolidation provisions would completely forestall the debtor, which is insolvent, from adopting and implementing a reorganization plan that would enable it to survive, and (2) the debtor cannot meet the full wage scales provided for in the agreements.

While fully accepting the evidence of REA's economic plight, Bankruptcy Judge Galgay nonetheless denied authority to disaffirm the two contracts, holding that "this is not the kind of rejection or disaffirmance intended by Congress nor would it be within the overall scheme of Chapter XI." REA immediately appealed this decision to the Southern District of New York, see 11 U.S.C. § 67(c),

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[1] Section 313(1) of the Bankruptcy Act, 11 U.S.C. § 713(1), provides:

> "Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter—
>
> "(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracs and to such other parties in interest as the court may designate."

where Judge Wyatt reversed. Judge Wyatt found on his review of the record that the agreements were onerous and burdensome "in any ordinary sense" and concluded that there was no limitation on the type of executory contract which a trustee or debtor-in-possession was permitted by § 313(1) to reject.

Discussion

In *Kevin Steel* we faced the question of whether a debtor-in-possession under Chapter XI of the Bankruptcy Act, which is subject to the National Labor Relations Act, may be authorized by the district court to reject an executory collective bargaining agreement. We concluded that such authority is to be found in the broad language and purpose of § 313(1) which provides, without qualification, that the court may "permit the rejection of executory contracts of the debtor". Although § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), to which *Kevin Steel Products, Inc.* was subject, prohibits any party to a collective bargaining agreement from terminating or modifying it unilaterally prior to exhausting certain negotiating procedures, we reasoned that, unless and until the agreement is assumed by the debtor-in-possession, the latter, being a different entity from the pre-bankrupt company, is not a "party" to the agreement and hence not subject to § 8(d)'s termination restrictions with respect to it.

Thus the tension between the Bankruptcy Act's policy in favor of giving the debtor a new start and the Labor Act's policy of encouraging enforcement of collective bargaining agreements was resolved by holding that, absent a clear Congressional mandate to the contrary, such as that specified in § 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n), with respect to "railroad employees", the enforcement of a collective bargaining agreement must yield to the bankruptcy court's power to relieve the debtor's

successor in bankruptcy immediately of onerous and burdensome executory contracts. At the same time we decided that a bankruptcy court must scrutinize with particular care applications for rejection of collective bargaining agreements, carefully balancing the equities on both sides in light of the Labor Act's policy. The case was accordingly remanded to the district court for a more thorough discretionary reconsideration of the advisability of authorizing rejection of Kevin Steel's collective bargaining agreement.

The central question before us in this case is whether a collective bargaining agreement subject to the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, is governed by the same principles. The unions maintain that the RLA's plain language prohibits any such rejection of a collective bargaining agreement made by the debtor-carrier except in the manner prescribed by that Act. We disagree. The face of the RLA, it is true, appears at first glance to lend some support to the union's position. A "carrier" is defined by § 1 of the RLA to include "any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier' . . . ." 45 U.S.C. § 151.[2] Section 2 of the RLA then provides that:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." 45 U.S.C. § 152, Seventh.

In addition, § 6 of the RLA, 45 U.S.C. § 156, (referred to above in § 2 as "section 156 of this title") obligates a car-

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[2] The National Labor Relations Act likewise applies to "legal representatives, trustees in bankruptcy, or receivers", 29 U.S.C. § 152, see *Durand* v. *NLRB*, 296 F.Supp. 1049, 1055 (W.D. Ark. 1969).

rier to utilize a protracted procedure for resolution of differences with respect to any proposed changes in a collective bargaining agreement, pending completion of which the carrier must maintain the status quo, even if the agreement has expired. See *Manning* v. *American Airlines, Inc.*, 221 F.Supp. 301 (S.D.N.Y. 1963), *aff'd.*, 329 F.2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964). Section 6 requires that at least thirty days' written notice be given of any intended changes in rates of pay, rules or working conditions and it requires conferences to be held with respect to the changes. The RLA further provides for submission of disputes to the National Mediation Board, see 45 U.S.C. § 155, if requested by either party or if the Board proffers its services. Section 6 also specifies that, pending the exhaustion of these procedures, "rates of pay, rules, or working conditions shall not be altered by the carrier. . . ."

The purpose of these provisions of the RLA, like that of § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), which was before us in *Kevin Steel*, is to avoid disruptions of commerce by forcing the parties to exhaust collective bargaining procedures and, where the RLA applies, to encourage use of arbitration and mediation before engaging in self-help, strikes or other forms of unilateral action. The unions contend that a trustee or debtor-in-possession, being a "carrier", is obligated to use the foregoing statutory notice, conference and mediation procedures before it may make any change in its collective bargaining agreements.

In response to this argument, REA points to the broad language of § 313(1) of the Bankruptcy Act, which without qualification authorizes the Bankruptcy Court to "permit the rejection of executory contracts of the debtor," 11 U.S.C. § 713(1). This section enables the court to implement the policy of Chapter XI, which is to permit the debtor-in-possession to deal with the debtor's property in a way that will enable it to survive, by relieving it of exec-

utory contracts that would threaten or prevent its survival. As Judge Wyatt observed, the Bankruptcy Act places no restriction on the type of executory contract which may be rejected under this section. See 8 *Collier on Bankruptcy* 199 (14th ed.). Furthermore, as we noted in *Kevin Steel,* Congress, by enacting § 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n), which excepts "railroad employees" from the operation of § 313(1), demonstrated that it "knew how to remove labor agreements from the scope of a general power to reject executory contracts," Slip. Op. 5113.[3] Both courts having held below, and the unions having conceded, that the collective bargaining agreements are "executory" as to their unexpired terms, REA argues that the Bankruptcy Act's plain language must prevail.

Faced with this apparent conflict in the language and purposes of the RLA and the Bankruptcy Act we must give effect to both statutes to the extent that they are not mutually repugnant. In the present case we are persuaded, as we were in *Kevin Steel,* that this can be accomplished by holding that where, after careful weighing of all of the factors and equities involved, including the interests sought to be protected by the RLA, a district court concludes that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse, the court may under § 313(1) authorize rejection or disaffirmance of the agreement. To hold that the RLA precludes rejection under such circumstances would ultimately be to defeat the purpose of the RLA itself, which is to avoid disruption of commerce by insuring that the carrier will continue operations pending

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[3] Section 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n), provides:

> "No judge or trustee acting under this [Act] shall change the wages or working conditions of railroad employees except in the manner prescribed in [the Railway Labor Act] . . ."

resolution of labor disputes, *since the end result could well be to preclude financial reorganization of the carrier and thus lead to its demise.* There then would simply be no operations left to disrupt. If REA's collective bargaining agreements with the unions, for instance, are too onerous and burdensome to permit it to survive, no purpose would be served by obligating it to resort to RLA negotiating procedures, which assume that the carrier involved is viable and will be able to meet its payroll and contractual obligations to employees and other creditors.[4]

When a carrier goes into bankruptcy and does not have the funds to continue operations indefinitely at existing levels and labor costs pending exhaustion of the protracted statutory RLA procedures for modification of its collective bargaining agreements, § 313(1) must govern. The practical effect of § 313(1) is to force all creditors doing business under executory contracts with the debtor in economic distress to renegotiate their mutual rights, relinquishing some in order to maintain the enterprise as a going concern so that they can at least realize a substantial percentage of what they would otherwise receive. It is a rare case when the financial distress of an enterprise in bankruptcy does not work a hardship on its creditors, including those who render services to the debtor. *No reason is shown why the unions and the employees represented by them should under such circumstances be permitted to insist upon strict compliance with their executory agreements with REA.*

When REA, after going into Chapter XI proceedings, was authorized to operate as the debtor-in-possession, it

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[4] Although Congress in § 77(n) of the Bankruptcy Act precluded federal courts from changing the terms and conditions of employment of railroad workers, it made this exception because railroads, being entitled to the unique benefits of railroad reorganization under § 77 of the Bankruptcy Act, did not come under Chapter X of that Act. See H.R. Rep. No. 1897, 72d Cong., 2d Sess. (1933); Sen. Rep. No. 92-1158, 92d Cong., 2d Sess. (1972).

acted as a new juridical entity. It was not a party to and was not bound by the terms of the collective bargaining agreement entered into by REA as debtor, see *Shopmen's Local Union No. 455, et al., and NLRB* v. *Kevin Steel Products, Inc., supra,* slip. op. at 5112; *In re Capital Service, Inc.,* 136 F.Supp. 430, 434 (S.D.Cal. 1955), unless and until the contract should be assumed, either expressly or conforming to its terms without disaffirmance, see *In re Public Ledger, Inc.,* 161 F.2d 762, 767 (3d Cir. 1947).[5] Although a debtor-in-possession such as REA is not bound to assume the collective bargaining agreements of its predecessor, it as a new employer is obligated to bargain collectively with the representative of the employees hired by it. The Supreme Court so held with respect to a new employer in a case governed by the NLRA, *NLRB* v. *Burns Security Services,* 406 U.S. 272, 277-81 (1972), and the result under the RLA is the same. Moreover, a trustee or debtor-in-possession, being a "carrier," is expressly obligated by § 2 of the RLA to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. . ." 45 U.S.C. § 152. This language has been interpreted to impose a positive duty on the carrier to bargain with the employees' certified representative. *Chicago & N.W. Ry. Co. v. United Transportation Union,* 402 U.S. 570, 574-76 (1971); *Virginia Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937).

The question crucial to the present case is whether, in addition to being required to bargain with the unions as representatives of the employees, the debtor-in-possession, as a new employer, is also obligated to maintain the status quo, i.e., adhere to the terms and conditions of employment presently in effect pending negotiations with the

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[5] We construe *Burke* v. *Murphy,* 109 F.2d 572 (2d Cir.), *cert. denied,* 310 U.S. 635 (1940), relied upon by appellants, as also dealing with a situation in which the receiver had implicitly adopted the debtor's labor agreements.

unions for collective bargaining agreements. In *NLRB* v. *Burns Security Services, supra,* the Supreme Court considered the applicability of such a requirement to a successor-employer subject to the NLRA which was obligated to bargain with a union. In that case Burns had replaced another employer in providing security services at a certain plant. Burns hired for itself 27 of the plant guards employed by the predecessor, and brought in 15 of its own employees. The Court held that, although Burns had a duty to bargain with the representative of the employees of the predecessor, it had no obligation to refrain from changing the terms of employment before such bargaining occurred. As a new employer, Burns was held to have a right unilaterally to set the initial terms on which it would hire employees. Moreover, the Court stated, to bind a successor-employer to the terms of its predecessor's collective bargaining contract could, where the terms of the agreement were onerous, discourage or inhibit a potential successor from taking over a failing business. Thus a new employer, it was emphasized, must be granted certain prerogatives at the outset in making changes in the method of operation, business structure and labor arrangements of a venture. Otherwise, the free flow of capital and efforts to revive or expand a weak enterprise might be frustrated.

These principles are particularly applicable to the efforts of a trustee or debtor-in-possession to save a carrier from complete collapse and liquidation. Unless the debtor-in-possession is permitted to act promptly, albeit unilaterally, in avoiding onerous employment terms that will prevent it from continuing as a going concern, the enterprise, and with it the employment of its workers, may fail. Although a solvent employer might be able to survive continuation of the status quo pending the protracted negotiations, including arbitration and mediation as provided for by § 6 of the RLA, a trustee or debtor-in-possession

in charge of a carrier teetering on the ~~bring~~ brink of disaster would, if saddled by onerous executory terms of its predecessor's agreements, not be able to continue in business that long.[6] Indeed, REA, as debtor-in-possession, maintains that unless it carries out immediately the plan (Plan B-2) which it has initiated for drastic reductions in its service-center facilities and regional accounting offices, requiring substantial reductions in rates of pay and operational economies, it will not be able to continue in operation at all.

For these reasons we are persuaded that REA, as the debtor-in-possession in bankruptcy, *is a new employer* which, while obligated as a carrier to negotiate with its employees' collective bargaining represntative, is not bound to follow the elaborate and protracted procedures of § 6 of the RLA before putting into effect its proposed terms of employment. Where its employees are represented, as here, by collective bargaining representatives,

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[6] As one commentator observed:

"It is doubtful that the Penn Central reorganization will continue long enough to enable its trustees to resolve the train crew dispute with the unions. It is even more doubtful that a Chapter X or XI proceeding for an airline can remain viable for the period required to exhaust the procedures of the RLA. Hence, the operation of that Act seems effectively to preclude the resolution of most labor relations disputes in a bankruptcy rehabilitation proceeding for a railroad or an airline. Moreover, the RLA seems also to preclude any interim relief from the onerous collective bargaining contract of a railroad or an airline in bankruptcy proceedings. Where the trustee, receiver or debtor in possession does not exercise the option to assume or reject such a contract, the Act forestalls the negotiation of a new and less onerous contract to apply while the proceedings are pending." *Countryman, Executory Contracts in Bankruptcy, Part II*, 58 Minn. L. Rev. 479, 498 (1974).

Section 77(n) of the Bankruptcy Act applies, of course, to the Penn Central, requiring it to follow the procedures prescribed by § 6 of the Railway Labor Act.

it is obligated merely to give reasonable notice of its proposed terms and to negotiate in good faith for a reasonable length of time before putting them into effect. In arriving at this conclusion we are not unmindful of the Supreme Court's dictum in *Burns* to the effect that there will be instances where, when a new employer retains all employees in a unit, it will be appropriate for the employer to consult with the employees' bargaining representative before fixing new terms, 406 U.S. at 294-95. However, we do not interpret this exception as mandating that a new employer, pending negotiation of a new agreement with the union (which the debtor-in-possession here is obligated to undertake by § 2 of the RLA, 45 U.S.C. § 152) *must adhere unqualifiedly to the terms of its predecessor's agreements.* We read this suggested exception as being limited to those situations where employees are led at the outset by the successor-employer to believe that they will have continuity of employment on pre-existing terms and *as not applying where the new employer dispels any such impression prior to or simultaneously with its offer to employ the predecessor's work force, Spruce Up Corp.*, 209 NLRB No. 19, 85 LRRM 1426 (1974), see Note, *The Bargaining Obligations of Successor Employers*, 88 Harv. L. Rev. 759, 777-78 (1975).

In the present case REA as debtor-in-possession has not misled employees into the belief that it would adhere to pre-existing terms, conditions and scope of employment pending negotiations with the unions. On the contrary, the Chapter XI proceeding, which was widely publicized, put the unions and REA employees on notice that changes would be required to avert collapse of REA. The debtor-in-possession, furthermore, then initiated changes by putting into effect a series of retrenchments and economies designed to enable operations to be continued on a lesser scale, including the partial implementation of Plan B-2, *deferred payment* of 10% of its union payroll, and reduction in holiday pay.

Appellants further contend that, even if the district court had authority under § 313(1) of the Bankruptcy Act to authorize REA to reject the debtor's collective bargaining agreements with the unions, the district judge abused his discretion in granting such authority in this case, since he failed to balance the equities, including the employees' inability in Chapter XI proceedings to evaluate and obtain compensation for loss of their pension, welfare, seniority and other contract rights. See *Matter of Overseas National Airways, Inc.*, 238 F.Supp. 359, 361-62 (E.D.N.Y. 1965). REA has countered by furnishing estimates of the dollar amounts that it would be obligated to pay under its agreement with BRAC if that agreement were continued in effect and estimates of the amounts which it proposes to save through consolidation and retrenchment under Plan B-2. However, in view of the serious effects which rejection has on the carrier's employees it should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, *the carrier will collapse and the employees will no longer have their jobs.* Here the record fails to indicate clearly the extent to which each agreement precludes continued operation of REA, the extent to which the district court weighed the conflicting equities, or any findings by the court other than its statement that "in any ordinary sense of the words the two contracts are 'onerous and burdensome' ". We note, for instance, that while certain clauses of REA's contract with BRAC would impose heavy burdens on REA, at least some of these clauses do not appear in its contract with IAM. Accordingly, substantially for the reasons stated in remanding *Kevin Steel,* we remand the case to the district court for further consideration and findings on the question of whether REA's agreements with BRAC and IAM are sufficiently onerous and burdensome to warrant an authorization to the debtor-in-possession to reject them.

APPENDIX "B"

[Filed May 19, 1975 S.D. of N.Y.]

OPINION

In Re:
REA Express, Inc., Debtor,
REA Express, Inc., Debtor and
Debtor-In-Possession,
Appellant,

-against-

Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station Employees, AFL-CIO
and
International Association of Machinists,
Appellees.

75 B 253

This is an appeal from an order of Bankruptcy Judge Galgay made on April 29, 1975. The order denied a motion by REA Express, Inc., debtor in possession in a proceeding under Chapter XI of the Bankruptcy Act, for an order permitting the rejection of two executory contracts between the debtor and two labor unions (referred to in short as BRAC and IAM). Authority for such an order is found in Section 313(1) of the Act (11 U.S.C. § 713(1)). Authority for the appeal is found in 11 U.S.C. § 67 (c) and Rules 801 and following of the Bankruptcy Rules.

The Bankruptcy Judge filed on May 2, 1975, an opinion giving the reasons for his decision.

1.

The Bankruptcy Judge found and it is undisputed that the two contracts are "executory'. He stated that he would

assume that a collective bargaining contract could be rejected but he concluded that rejection of the two contracts by REA "is not the kind of rejection or disaffirmance intended by Congress nor would it be within the overall scheme of Chapter XI."

The Bankruptcy Judge believed that rejection should be permitted if the contracts were "onerous and burdensome" but he appears to have felt that such a finding could never be made if it would permit rejection of a collective bargaining contract.

The findings of fact of the Bankruptcy Judge (which are accepted) show, however, that in any ordinary sense of the words the two contracts in suit are "onerous and burdensome". This expression appears to be quoted from *In re Overseas National Airways, Inc.*, 238 F.Supp. 359 (E.D.N.Y. 1965). Section 313(1) does not itself provide any guidance to the exercise of the power of rejection but it seems clearly intended that rejection should be permitted if it would be beneficial to the estate of the debtor. See 8 Collier on Bankruptcy (14th ed.) 206-207. The findings of the Bankruptcy Judge show that in the circumstances of REA these two contracts are detrimental to its operations and thus to its estate.

2.

There is nothing cited in legislative history to indicate that collective bargaining agreements cannot be rejected under Section 313(1). 8 Collier on Bankruptcy (14th ed.) 199 states: "There is no restriction on the type of executory contract that may be rejected."

Judge Levet some years ago decided that collective bargaining agreements were subject to rejection under Section 313(1). *In re Klaber Bros. Inc.*, 173 F.Supp. 83 (1959). Later decisions to the same effect are collected in Judge Knapp's opinion in *Shopmen's Local Unions etc.* v. *Kevin*

Steel Products, Inc., 381 F.Supp. 336 at 338 (1974) (now in the Court of Appeals, with oral argument said to be scheduled for June 11, 1975). Judge Knapp's decision, which is contrary to that of Judge Levet, is easily distinguishable on the facts; from the broad conclusion drawn by Judge Knapp, I must, with great deference to a learned colleague, respectfully dissent.

3.

The Bankruptcy Judge did not reach a point made for appellees, namely, that Section 77(n) of the Bankruptcy Act (11 U.S.C. § 205) precludes rejection by REA of an executory contract affecting wages or working conditions of its employees. Section 77(n) provides in part as follows:

> "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45 [Railway Labor Act], as amended June 21, 1934, or as they may be hereafter amended."

This provision might give some pause were it applicable, but it is plainly not applicable.

Section 77 of the Bankruptcy Act deals with "Reorganization of Railroads Engaged in Interstate Commerce", was enacted in 1933 to meet special needs in respect of railroad reorganizations, and would seem to have no conceivable application to REA. By its terms that part of Section 77(n) on which appellees rely applies to "railroad employees". No claim is made or could be made that the employees of REA are "railroad employees".

The decision in *In re Overseas Airways, Inc.*, above cited, is distinguishable on its facts. If it were applicable to the case at bar, it would not be followed.

4.

The appellees also rely on a part of the Railway Labor Act (45 U.S.C. § 1 and following), specifically on that part of 45 U.S.C. § 152 providing that no change may be made by a "carrier" in "working conditions of its employees . . . as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [45 U.S.C. § 156]". This provision does not preclude rejection of the "agreements" in bankruptcy. It applies only during the life of the "agreements". If such "agreements" have come to an end, either by expiration of their agreed term or by rejection in bankruptcy, then the provision ceases to have any application.

The order of the Bankruptcy Judge is reversed and the motion of REA for permission to reject the two executory contracts is granted.

So Ordered.

Dated: May 19, 1975

/s/ Inzer B. Wyatt
Inzer B. Wyatt
United States District Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for An Arrangement

No. 75 B 253

In the Matter

—of—

REA EXPRESS, INC., *Debtor.*

OPINION

APPEARANCES:

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JOHN J. GALGAY, *Bankruptcy Judge*

REA Express Inc. (REA) moves pursuant to Sec. 313(1) of the Bankruptcy Act and Rule 11-53 of the Rules of Bankruptcy Procedure to disaffirm two collective bargaining agreements as burdensome and onerous. Two unions, Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees ("BRAC") and International Association of Machinists

and Aerospace Workers ("IAM") move to compel REA to comply with its collective bargaining agreements and to restore certain deferred wage payments to "BRAC" and "IAM" members.

The material facts developed over two days of hearings are not in serious dispute and are as follows: REA Express, Inc. ("REA") filed a petition under Chapter XI, Section 322 of the Bankruptcy Act on February 18, 1975 and by order of this Court on that date, REA was continued in the possession and operation of its business. REA is a Delaware corporation with its principal place of business in New York City. It provides surface and air express service to customers throughout the United States. It has some 300 terminals or service center facilities in all fifty states and Puerto Rico and presently employs 7,624 persons.

REA is a party to two collective bargaining agreements. Approximately 6,305 of its employees are covered by a collective bargaining agreement between REA and BRAC, which agreement does not expire until December 31, 1975. Approximately 332 of its employees are covered by a collective bargaining agreement between REA and IAM which agreement does not expire until June 1, 1976. During 1974 there were approximately 8,500 BRAC employees and 400 IAM employees. Each collective bargaining agreement prescribes the terms and conditions of employment for covered employees including (a) wage rates, (b) overtime pay, (c) holiday pay, (d) vacation pay, (e) fringe benefits and (f) unemployment or "layoff" benefits. Each agreement affects REA's right to close or discontinue or consolidate facilities and to transfer or layoff workers.

As of March 28, 1975 REA had incurred liabilities as debtor in possession of $3,317,000. In addition, it had an outstanding payroll liability of $4,050,000 and a liability for "CODs" collected on behalf of its customers of $1,871,000. REA is presently collateralizing outstanding

irrevocable letter of credit issued by First Pennsylvania Bank, N.A. ("First Penn") with cash at the rate of $75,000 per week and is paying the IRS on account of pre-filing Railroad Retirement Taxes, $25,000 per week. Some $500,000 has already been deposited as cash collateral for letter of credit and some $1,900,000 in letters of credit remains to be collateralized.

Asserting that it was unable to meet its expenses on a current basis, REA's Management, in a collective decision, deferred payment of 10% of its union payroll for the four consecutive weekly pay periods commencing February 24th, March 3rd, 10th and 17th, 1975. This 10% deferral remains a liability of REA and amounts to some $150,000 per week. In addition, REA has been unable to pay its union employees some $250,000 due them as holiday pay for Washington's Birthday. For each of the four weeks commencing March 31, 1975, REA requires approximately $3,500,000 to meet its current obligations assuming a continuation of the 10% deferral in union wages and the present level of payments to the First Penn and the IRS. Revenues are projected at some $3,500,000 per week over this period with the result that as of April 25, 1975, the cash balance is estimated at $547,000. These projections do not take into account the payment of the $3,317,000 in DIP liabilities already incurred.

Assuming the continuation of a 90% union payroll, REA claims it cannot continue to operate without either generating more cash or substantially reducing its costs. It is not meeting its obligations currently and seems to have survived to date by deferring obligations to trade creditors, equipment lessors and its employees.

REA's gross payroll amounts to some $1,700,000 per week with wages representing some 60% of REA's total weekly expense. Of this gross payroll some $1,500,000 represents union wages of which 95% is paid to BRAC members and the balance to IAM members. As previously

noted, 10% of the union payroll has been deferred for several weeks allegedly due to lack of cash while executive payroll has been reduced between 15% and 20%.

REA has generated two alternate plans or programs designed to revise its operations and reduce its costs of operation. These plans, known as A and B-2 have not been implemented because of provisions contained in its collective bargaining agreements with BRAC and IAM.

During the period from 1969 (when current management took over) to 1973, REA's expenses almost consistently exceeded its revenues. In 1974, REA, for the first time, realized a small profit. However, starting in or about November of last year, adverse economic conditions brought about a decline in revenues, and on February 18, 1975 these proceedings were filed. Despite reductions in its expenses REA has been unable thus far to keep pace with declining revenues.

REA's plan B-2 contemplates the closing of 61 service centers and the consolidation of 53 service centers; the elimination of 2 regional accounting offices; and the reduction of service center facilities from 301 to 187. REA claims the effect of the implementation of Plan B-2 will be to restore the balance between REA's operating revenues and expenses so that in June of this year REA will show a small operating profit and by August of this year, it projects an excess of revenues over operating expenditures on a permanent basis. Even with the implementation of Plan B-2, REA claims it could not operate profitably at present revenue levels and still pay 100% of existing payrolls as mandated by its collective bargaining agreements with BRAC and IAM.

REA's Plan A is an all air express plan which completely eliminates surface operations. It contemplates the closing of 297 service centers, the use of 140 air terminals and 328 "third-party" locations. REA would end up with

144 operating facilities servicing 472 airport locations. The vehicle fleet would be reduced from 6,447 to 784 and the number of employees would be reduced to 1800. Plan A contemplates profits for REA commencing with August, 1975. Like Plan B-2, the implementation of Plan A will not result in profitable operations without a reduction in existing payrolls. The cash flow projections for both Plan A and Plan B-2 do not take into account any of the one-time costs of implementation or the payment of existing debts. It is claimed, however, it will provide a basis on which a successful operation may be predicated.

REA's agreement with BRAC required a 15% wage increase on April 30, 1973 and eight cents per hour cost of living adjustment on February 3, 1974, a ten cents per hour adjustment on July 1, 1974, a 10% increase on October 1, 1974 and nine cents per hour adjustment on February 1, 1975. REA's agreement with IAM required similar increases to those granted to BRAC.

In 1974 REA paid its employees approximately $101,000,000 in wages, $9,000,000 in vacation pay, and $3,000,000 in holiday pay. Under the collective bargaining agreements with BRAC and IAM, REA is required to pay supplementary unemployment. Accrued vacation benefits required by the Union agreements total $11,000,000. In the event BRAC members are layed-off they are entitled under their collective bargaining agreement to $18.00 per day unemployment benefits for some 781 days of which REA must pay $5.30 per day per employee until Railroad Unemployment benefits are exhausted and, thereafter, REA must pay the full $18.00 per day. In 1974 these benefits cost REA almost $600,000.

REA's agreement with BRAC required comparability increases which have not yet been implemented but if they are will increase REA's payroll costs.

Rule 12 of REA's agreement with BRAC governs REA's right to effect the transfers and consolidations inherent in

either Plan A or Plan B-2. Rule 12 may involve delays up to at least 60 days, and it requires arbitration of any dispute respecting a transfer or consolidation upon demand by the Union. BRAC can not deny REA's right to change its operations, but it may compel arbitration of the "manner of implementing the contemplated change". Employees who are laid-off are entitled to supplementary unemployment benefits and those who elect to follow their work are entitled to free movement of household goods, free transportation, time-off to relocate and the like.

The implementation of Plan B-2 involves changes in what are known as "over-the-road runs". Such changes are governed by Rule 8 of the BRAC agreement which requires consultations between REA and Union before such changes may be effected.

DISCUSSION

REA asserts it is unable to effect the proposed consolidation under its existing collective bargaining agreements by reason of the delays inherent in following the procedures thereby required and by reason of the costs to REA mandated such agreements. REA asserts it cannot meet its contractual wage and fringe benefit obligations; it claims it cannot meet its obligations to suppliers as debtor in possession; and it cannot incur substantial liabilities for unemployment and relocation benefits required by its agreements with BRAC and IAM. It further claims it must effect reductions in costs promptly and inexpensively.

REA also claims it is unable to pay the wages presently required by it collective bargaining agreements with BRAC and IAM and the cost-of-living, comparability and other benefits which will, in the future, be required by those agreements.

Further it says if REA is permitted to promptly implement either Plan A or Plan B-2 and to maintain its union

payroll at existing levels it has a reasonable chance of obtaining needed financing, restoring profitability and effecting a plan of arrangement with its creditors. It claims it cannot accomplish these objectives unless its collective bargaining agreements with BRAC and IAM are disaffirmed.

For all of the foregoing reasons, REA asserts that the collective bargaining agreements between it and its unions BRAC and IAM are onerous and burdensome.

The unions urge that the collective bargaining agreements between REA and them are governed by the Railway Labor Act, that REA is a "Carrier" subject to the provisions of that statute and that it cannot change the "rates of pay, rules or working condition of its employees" except in the manner prescribed in the Act or in the collective bargaining agreement itself. They claim REA acted illegally in unilaterally reducing the wages paid to its employees who are covered by the instant collective bargaining agreements.

They *fail* to *directly claim* that these collective bargaining agreements *are not onerous and burdensome* but say if they are so are the terms of a great number of contracts and agreements to which REA is a party, yet REA has not sought to have this Court disaffirm any of its other agreements.

Finally it claims that this Court has the power and should compel REA to honor the terms of the labor agreement.

Sec. 313(1) of the Bankruptcy Act permits the rejection of executory contracts of the debtor upon notice to the parties to such contracts and to such other parties as the Court may designate.

Assuming, without deciding that this Court has the power to reject a collective bargaining agreement, it may exercise that power if it finds the agreement to be executory

and "onerous and burdensome" to the debtor. Cf Shopmen's Local v. Kevin Steel Products, (2d Cir.) 74-215A.

Both labor agreements herein are executory within the meaning of Sec. 313(1) since their expiration dates are the end of 1975 and the middle of 1976.

This case turns then on the meaning of "onerous and burdensome" in the context of a dispute wherein REA claims the terms of the collective bargaining agreements are so oppressive, restrictive and expensive that it cannot possibly survive in a Chapter XI proceeding unless these agreements are scrapped, and impliedly, a more congenial one negotiated.

Ordinarily the rejection of an executory contract is based upon the debtor's desire to end a commitment which presents a financial drain on the company and thereby enable it to come out of a Chapter XI proceedings by the acceptance of a plan of arrangement by its creditors. It does not mean that an agreement which, when entered into was satisfactory, but because of changing economic circumstances, is now too expensive. The usual instance of a contract appropriate for rejection is a lease of expensive office facilities, say, on Park Avenue, and because of reduced staff and the change in the nature of the business, such prestigious and expensive quarters are no longer needed and its continued performance thereunder would be a financial drain.

Another example would be the rejection of executory contract involving the employment of dress designers after the Chapter XI debtor changed the nature of its operation from designing and manufacturing its own dresses, to that of a jobber or contractor doing work for other manufacturers who had their own designers.

Here, REA says, if it can reject and disaffirm these labor contracts then it can embark on Plan A or Plan B-2 and within a short time rehabilitate itself. It says the contin-

uance of the executory contracts is a financial drain as it probably is, but it wants to retain its labor force to continue the operation of its business but at some level of wages, working conditions and other provisions less than those in the present agreements. To permit the rejection of these contracts would destroy the economic balance of power each party enjoyed when the contracts were entered into. The employees would be at a substantial disadvantage and be in the position where REA could dictate the terms of any new agreement. Further Sec. 313(1) contemplates upon the rejection of an executory contract, the party who suffers thereby is allowed to file a claim in the proceeding for its provable damage. Apart from those damages easily calculated such as past wages, vacation and severance pay, how can a damage figure be placed on the value of pension rights, welfare rights, seniority rights, etc. to each of the affected employees. The Bankruptcy Court is a Court of Equity and must balance these equities in the exercise of its discretion.

The history of the hostility between management and labor in REA since 1969 is the subject of an opinion in *REA EXPRESS Inc.* v. *BRAC,* 358 Fed Supp. 760, by Hon. Edward Weinfeld. In it Judge Weinfeld recites the long and difficult experiences of both parties in connection with a threatened strike.

In that opinion, Judge Weinfeld made comments which are illuminating and relevant in this proceeding.

> "That a carrier is in economic straights does not require its employees to carry the burden of its economic problems. . . . REA is a private enterprise corporation operating under a laissez-faire economy; the circumstances that it cannot meet the demands of a competitive system and may face bankruptcy does not require its employees to accept a wage they deem inadequate and to surrender their right to strike. To

hold that the employees assertion of their rights manifests a failure to exert every reasonable effort to resolve all disputes and thereby constitutes a Sec. 2 First Violation is without validity. It suggests that a court has the power to apply a coercive force upon the employees to yield to the carrier's offer even though they deem it inadequate—in effect it would be to impose upon them the financing of an under-capitalized carrier when its own stockholders, here few in number, refuse to make further investments and supply needed capital."

In the matter of Overmeyer, Bankruptcy Judge Roy Babitt, Collier-Bankruptcy Cases, Volume 1, pg 522, in refusing to permit the rejection of a lease of real property stated:

"Moreover, this debtor does not contend that the warehouse is totally unprofitable; it merely states that the profits generated from its operation are not sufficient and that West Cash & Carry should now be told that a contract under which it has performed its pact for eight years is now to be negated, thereby forcing West Cash & Carry to renegotiate a new contract of lease or peremptorily remove its operation elsewhere."

After commenting on his power to do equity he goes on

"I conclude, in the exercise of my judgment, that this is not the kind of rejection purposed by Congress by its language in Sec. 313(1). Nor would such rejection be within the overall scheme of Chapter XI. Chapter XI is not a guarantee that every plagued company will succeed in Chapter XI rehabilitation, *In re Webcor, Inc.* 392 F.2d 893 (7th Cir. 1968), *cert. denied* 393 U.S. 837 (1968), and it gives no basis to hold that performing parties to agreements which years later might have become less economically desirable than they were at the beginning, are to be prejudiced in their reliance on such agreements made with sophisticated debtors under terms, one may assume, as advan-

tageous to that debtor as could be when originally negotiated."

The Court has been called on to decide this issue. It has not been called on to weigh for the debtor or the Unions, the consequences which might flow from adjudication, including possible termination of thousands of jobs in these recession days, unemployment for a period of time, loss of pension payments to former employees and other disabilities. Surely both parties are sophisticated enough to know where their interests lie.

I conclude that REA's application to reject and disaffirm the collective bargaining agreements with BRAC and IAM should be denied. In my judgement this is not the kind of rejection or disaffirmance intended by Congress nor would it be within the overall scheme of Chapter XI.

As has been observed, Chapter XI is not a guarantee that every plagued company will succeed in Chapter XI rehabilitation. *In re Webcor Inc.* 392 F.2d 893 (7th Cir. 1968).

Regarding the Union's demand that the Court order that REA honor its collective bargaining agreements and to pay 100% of the rate of wages called for therein, I decline to do so.

The Unions have remedies available to them under such agreements, and this court may await the administrative grievance process, see *Nathanson* v. *NLRB* 344 US 25 (195).

In view of the financial conditions of the debtor in possession detailed above, I feel the parties to the agreements can evaluate the wisests course to follow in light of all the circumstances. REA's application for authority pursuant to Sec. 313(1) of the Bankruptcy Act to disaffirm its executory contracts with BRAC and IAM is denied.

The applications of BRAC and IAM seeking an order of this Court directing REA to pay such sums as are due and payable to employees who are members of their respective unions under the terms of existing labor agreements between the parties is also denied at this time without prejudice.

IT IS SO ORDERED.

JOHN J. GALGAY

Dated: New York, New York
May 2nd, 1975